MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES S. FOLTZ, *et al.*,
Petitioners,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONERS' REPLY BRIEF

ALAN RAYWID
Counsel of Record
MARGARET E. HAERING
JOHN D. SEIVER
SUSAN PARADISE BAXTER
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, N.W.
Second Floor
Washington, D.C. 20006
(202) 659-9750

Attorneys for Foltz Petitioners

GEORGE A. BANGS
JOSEPH M. BUTLER
BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS
P.O. Box 2670
Rapid City, South Dakota 57709
(605) 343-1040

JEROME K. WALSH, JR.
LANE & MITTENDORF
99 Park Avenue
New York, New York 10016
(212) 972-3000

Attorneys for Richardson and Kirby Petitioners

May 26, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF AUTHORITIES

CASES	Page
Alessi v. *Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981)	3
Fink v. *National Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985)	5
Eaves v. *Penn*, 587 F.2d 453 (10th Cir. 1978)	5
Leigh v. *Engle*, 727 F.2d 113 (7th Cir. 1984)	5
STATUTES AND REGULATIONS	
29 U.S.C. § 1104	5
29 U.S.C. § 1108(f)	6
29 C.F.R. § 2620.2	1
Revenue Ruling 59-60, 1959-1 C.B. 237	1
Revenue Ruling 70-125, 1970-1 C.B. 87	4
Revenue Ruling 80-155, 1980-1 C.B. 84	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1766

CHARLES S. FOLTZ, *et al.*,

Petitioners,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

The Opposition to the Petition for Certiorari demonstrates the inherent danger of allowing determination of the fair market value of employer securities held by a defined contribution plan to be influenced by plan managers who interject the maintenance of employee ownership into the valuation decision. Contrary to Respondents' assertion (Opposition at 3), the term "fair market value" as applied to the valuation of corporate stock, has only *one* accepted meaning: "The price a willing buyer would pay a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the pertinent facts."[1]

Respondents' suggestion that "fair market value" is a fluid concept, to be "adjusted" to fit corporate structure or goals, flies in the face of standard ap-

---

[1] *See* Revenue Ruling 59-60, 1959-1 C.B. 237 (App.254a-255a); 29 C.F.R. § 2620.2 (App.254a).

praisal practice. It is the interest being valued—and the degree of control of the business that it represents—that determines whether a minority or majority valuation is called for.[2] The valuation of what was admittedly a majority interest in a corporation as if it were merely a group of minority interests was a *departure* from accepted appraisal practice. The fact that one has the ability to "order" valuation of an asset to be performed on a different basis than that called for by appraisal guidelines does not transform the result into the "fair market value" of the asset,[3] and Respondents' assertion that they are somehow equivalent is simply doublethink.

It is significant that when the directors and Plan fiduciaries decided to sell U.S. News, they obtained an appraisal of the "fair market value" of the stock and selected a firm other than American Appraisal to perform the analysis. The result of that appraisal

---

[2] The Uniform Standards of Appraisal Practice adopted by the American Society of Appraisers require the appraiser to "adequately identify the business enterprise, assets or equity under consideration . . . and define the interest being considered . . . (iii) if the appraisal concerns equity interests in a business enterprise, consider whether the interests are appraised on a majority or minority basis." S.R. 9-2, *Business Valuation Review*, Dec. 1987, 164, 167.

[3] The Uniform Standards of Professional Practice specify that an appraiser who is asked to perform an assignment that calls for something "less than or different from the work that would otherwise be required by the specific guidelines" may do so only if the assignment is "not so limited in scope that the resulting appraisal . . . would tend to mislead . . . the users of the report . . .; and . . . the report . . . includes a qualification that reflects the limited or differing scope of the appraisal." *Id.* at 164.

was eight times greater than the stock value assigned by American Appraisal for 1982 and 28 times the average price of $100 per share used to calculate Plan benefits during the class period. Respondents paint over these enormous inequities and the fact that the persistent undervaluation of the Plan's assets resulted in the payment of a windfall to a favored "rolling class of future beneficiaries."

Respondents, once again, incorrectly urge reliance upon *Alessi* v. *Raybestos Manhattan, Inc.*, 451 U.S. 504, 511 (1981), where the Court held that ERISA leaves the decision of what benefits will be provided to the private parties creating the Plan. Whatever *Alessi* has to say about *design* of a defined benefit plan, it does not and cannot support a plan interpretation that provides for valuation of assets in a defined contribution plan at less than "fair market value." Nor can *Alessi* sanitize, in the name of employee ownership, a manipulative valuation that withholds benefits from retirees and transfers them to a future class of beneficiaries.

The misinterpretation urged upon the Court here, in the name of employee ownership, robs retiring beneficiaries of the only benefit that the Plan's investment in employer stock was intended to provide—retirement income. The Plan paid *cash* for its U.S. News stock, and the participants on whose behalf the interest was held were entitled to have the annual valuation reflect the economic benefit of the Plan's ownership of the controlling block of stock in the company. The fact that the Plan's investment of virtually all its assets in U.S. News stock meant that there were insufficient liquid assets to pay benefits

based on the "fair market value" of its 70 percent interest in the company, did not justify slashing the retirement benefits paid to Petitioners. A defined contribution plan by its very nature requires that the realizable value of its assets be passed on to participants as they retire.[4]

Respondents' Opposition is inconsistent with the lower court opinions they seek to uphold. On the one hand Respondents argue that the lower court rulings do not rely upon the principle that the maintenance of employee ownership justified valuation of the Plan's U.S. News stock at less than "fair market value", as obtained in a hypothetical sale. That argument is plainly inconsistent with the rationale of both lower court opinions. 865 F.2d 364, 373 (D.C. Cir. 1989) (App.16a); 663 F. Supp. 1494, 1525 (D.D.C. 1987) (App.80a-81a). After disclaiming that the subjective intent of maintaining employee ownership has anything to do with the matter, Respondents then defend the undervaluation of the Plan's major asset because it is consistent with the concept of employee ownership. They buttress this assertion by repeating the Court of Appeals' rationale that ERISA "favors" employee ownership. Either maintenance of employee ownership is a valuation consideration (thus negating the standard definition of "fair market value") or it is not. It is pure sophistry for Respondents to suggest now that preservation of employee ownership was not

---

[4] Respondents' Opposition ignores entirely the unambiguous requirement of Revenue Ruling 80-155, 1980-1 C.B. 84 (App.261a) and Revenue Ruling 70-125, 1970-1 C.B. 87 (App.259a), that a defined contribution plan must annually ascertain the "fair market value" of the plan's assets and allocate that amount to participants' accounts.

the asserted justification for undervaluation of the Plan's employer stock. The lower courts were far more straightforward in their misplaced reliance on employee ownership than the Respondents have been in defending those decisions.

Respondents concede that Section 404(a) of ERISA obligates fiduciaries to act for the "exclusive purpose" of providing benefits. They also admit that the decisions in *Fink* v. *National Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985); *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978); and *Leigh* v. *Engle*, 727 F.2d 113 (7th Cir. 1984), direct that considerations foreign to the interests of participants and the provision of retirement benefits must yield under Section 404(a). Yet, while conceding these principles, Respondents somehow find a "loophole" in applying Section 404(a) to an asset valuation that could have yielded up to ten-fold increase in benefits to retiring participants. In short, Respondents are willing to admit that Section 404(a) incorporates all protections except those that would have translated into tangible benefits for Petitioners. Although Respondents state that these decisions "miss the mark", they fail to distinguish them.

Respondents attempt to minimize the impact of the decision below or its potential for future mischief by characterizing it as having limited application. In their effort to compare the U.S. News Plan to an ESOP, Respondents only accentuate the error of attempting to fractionalize the asset actually held by the Plan as a block and administered by fiduciaries charged with protecting participants' interests. The U.S. News Plan was *not* an ESOP. Perhaps, it could have been

amended to become an ESOP, but it never was,[5] and Respondents' attempt to ignore statutory distinctions is improper. Section 6.4 of the Plan provided that each participant's account represented an undivided interest in the assets of the Plan. The valuation of assets in a defined contribution plan translates directly into benefits that participants can expect to receive. Application of appropriate fiduciary standards to valuation of plan assets is critical for the protection of participants covered by these plans. Any lowering of the standards to fulfill what is essentially a corporate purpose, places in jeopardy all defined contribution plans that invest in employer securities. If there is any question about the impact and error of this decision, perhaps the Court may wish to obtain the views of the Department of Labor through the Solicitor General.

For the foregoing reasons Petitioners pray that the Court grant their Petition for a Writ of Certiorari to

---

[5] Respondents' argument that the ESOP example should simply be transferred to the valuation of assets held in the U.S. News Profit Sharing Plan is misleading in several respects. First, participants in an ESOP have the option of receiving an "in-kind" distribution of employer securities; participants in the U.S. News Plan did not. Second, Congress has amended ERISA's definition of "qualifying employer securities" to prevent ESOPs from acquiring more than 25 percent of the aggregate amount of any class of stock and to require that *at least* 50 percent of the aggregate amount be held by persons independent of the issuer, 29 U.S.C. § 1108(f), added by Pub. L. 100-203 § 9345(b). Far from providing support for a practice of redeeming shares in an ESOP holding a controlling interest on a minority basis, Congress' recent restrictions on "qualifying employer securities" imply a recognition of past abuses in the acquisition, valuation and redemption of ESOP interests and a greater need for exercising control over the stock interests sold to ESOPs.

the U.S. Court of Appeals for the District of Columbia.

Respectfully submitted,

ALAN RAYWID
Counsel of Record
MARGARET E. HAERING
JOHN D. SEIVER
SUSAN PARADISE BAXTER
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, N.W.
Second Floor
Washington, D.C. 20006
(202) 659-9750

Attorneys for Foltz Petitioners

GEORGE A. BANGS
JOSEPH M. BUTLER
BANKS, MCCULLEN, BUTLER, FOYE & SIMMONS
P.O. Box 2670
Rapid City, South Dakota 57709
(605) 343-1040

JEROME K. WALSH, JR.
LANE & MITTENDORF
99 Park Avenue
New York, New York 10016
(212) 972-3000

Attorneys for Richardson and Kirby Petitioners